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ZNR UUUUU ZZH
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FM AMEMBASSY KHARTOUM
TO RUEHC/SECSTATE WASHDC IMMEDIATE 2414
INFO RUCNFUR/DARFUR COLLECTIVE
RUCNIAD/IGAD COLLECTIVE
RHMFISS/CJTJF HOA

UNCLAS SECTION 01 OF 02 KHARTOUM 001717

DEPT FOR AF A/S FRAZER, SE WILLIAMSON, AF/SPG, DRL
NSC FOR PITTMAN AND HUDSON
ADDIS ABABA FOR USAU
DEPT PLS PASS USAID FOR AFR/SUDAN

SENSITIVE
SIPDIS

E.O. 12958: N/A

TAGS: [ASEC](#) [PGOV](#) [PREL](#) [KPKO](#) [SOCI](#) [AU](#) [UNSC](#) [SU](#)

SUBJECT: ARTICLES 17 AND 19 OF THE ROME STATUTE: SUDAN'S LEGAL
SYSTEM UNLIKELY TO BE OF HELP TO PRESIDENT BASHIR

11. (SBU) Summary: Articles 17 and 19 of the Rome Statute of the International Criminal Court (ICC) provide room for Sudan to head off impending ICC trials of Sudanese nationals by conducting its own investigations and prosecutions, but legal experts doubt that Sudan possesses adequate laws and an "able and willing" judicial climate to carry out its own trials. Although reports indicate that ICC indictee Ali Kushayb is currently in custody (reportedly under house arrest in Khartoum, but able to move about freely,) while his fellow indictee Ahmed Haroun is said to have reduced his activities as State Minister of Humanitarian Affairs, but continues to participate in some public events. End Summary.

12. (SBU) Even though Sudan is not a party to the ICC, articles 17 and 19 of the Rome Statute provide Sudan with legal cover under the term "complimentarity." In other words, in lieu of an ICC investigation, Sudan has both the discretion and the jurisdiction to conduct its own prosecutions and trials for crimes such as genocide, war crimes and crimes against humanity. In a best-case scenario for the ruling National Congress Party (NCP), article 17 permits the ICC to classify a case as inadmissible if "the case is being investigated or prosecuted by a State which has jurisdiction over it." Article 19 similarly permits Sudan to challenge the jurisdiction of the court, following a decision on the case's admissibility, "on the ground that it is investigating or prosecuting the case or has investigated or prosecuted." (Note: An article 18 ruling on inadmissibility has been obviated by Security Council resolution 1593. End note.) Should the Sudanese carry out their own trials of Sudanese war crimes suspects and find them not guilty, article 20 guarantees that protection from double-jeopardy would apply provided trials were "conducted independently or impartially in accordance with the norms of due process recognized by international law."

13. (SBU) Mohamed Ibrahim, a former Egyptian judge and currently a senior officer at UNMIS Human Rights, told poloff on November 24 that it would take a major "leap of faith" for the ICC to conclude that the Government of Sudan (GoS) would be "able and willing" to carry out its own investigation and prosecution of war crimes suspects. Legislative drafts of amendments to the Sudanese criminal code include prosecution for war crimes and crimes against humanity, and according to Ibrahim, could meet the standards to prevent an ICC investigation. However, the possibility remains that the amendments will be greatly watered down to remove prosecution for the crimes mentioned in the Rome Statute. Additionally, up to this point, no draft has included any mention of retroactivity, which would be necessary to prosecute individuals for the crimes already committed in Darfur. However, Ibrahim added that Sudan could hypothetically investigate and prosecute internally war crimes suspects under the Geneva Conventions, which Sudan ratified in 1957. Salih Mahmoud Osman, a opposition member of Parliament and prominent human rights lawyer, told poloff that the bill covering the amendments to the criminal code has not yet been presented to Parliament, and with the

Parliament ready to close shop for almost all of December, those bills may not reach a vote until far into the new year.

¶4. (SBU) Sarah Nouwen, a Dutch legal scholar studying practical applications of articles 17-19 of the Rome Statute at the University of Cambridge, told poloff that even if Sudan manages to organize a credible legal process against Haroun and Kushayb, this is unlikely to help with the arrest warrant hanging over the head of Sudanese President Omar el-Bashir. If a genuine prosecution of Haroun and Kushayb under Sudanese law satisfies the conditions of articles 17 and 19, the prosecutor, under article 53 of the Rome Statute, can conclude that "a prosecution is not in the interests of justice...(or) the interests of victims," and can determine that there is no "reasonable basis to proceed with the investigation." However, article 53 may be far from good news for Bashir and the NCP, as according to Nouwen, ICC Prosecutor Luis Moreno Ocampo has already drafted a paper suggesting that the interests of justice and the interests of peace are two different issues not entirely compatible with one another.

¶5. (SBU) Ibrahim told poloff that he envisions one of two macabre scenarios taking place either before or after the ICC issues an arrest warrant for Bashir. In the first scenario, the NCP could choose a Darfur war crimes scapegoat whose "elimination" would sever the chain of command leading from the crimes themselves to senior figures in the government; Ibrahim cited the suicide of Syrian Interior Minister Ghazi Kanaan in the case of the 2005 assassination of Lebanese politician Rafik Hariri as a similar case. In the second scenario, Haroun and Kushayb could be pressured to confess to the ICC accusations, in exchange for the ICC's strongest penalty - life imprisonment in the Hague, as the ICC has no death sentence. Their personal sacrifice would maintain the status quo in Sudan,

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while at the same time ensuring rich compensation for their tribes - something similar to what Libya did with the Lockerbie case. (Comment: It seems unlikely to us in the Sudanese context that either of these scenarios is likely. An attempt at local justice is about as far as the regime can go, given the need to maintain the loyalty of the many others who have also committed crimes and don't want to see the regime start turning over indictees to the ICC. End comment.)

¶6. (SBU) By all indications, Sudanese authorities have yet to take any real action to arrest Haroun and Kushayb. PCP leader Hassan al-Turabi recently told CDA Fernandez that State Minister Haroun has been absent from the office and maintaining a low profile ; however, the embassy received an invitation to a November 26 NCP-organized "International Youth Forum for Thought and Culture" at which Haroun is scheduled to speak. Kushayb's whereabouts have not been confirmed; however, a source with the Darfur Bar Association in El Geneina denied rumors that Kushayb is in custody in the capital of West Darfur. Others have told us that Kushayb is in Khartoum, technically under house arrest but free to move about the city.

¶7. (SBU) Comment: We have heard from some of our European counterparts in Khartoum that the ICC indictment of President Bashir may come sooner than expected, perhaps in December, and, even if this is inaccurate, there appears to be little the regime can do now to head off the ICC. The GOS is likely to resort to articles 17 and 19 of the Rome Convention if and when an arrest warrant is issued and if the Security Council does not pass and article 16 deferral, as now appears increasingly unlikely. While post claims no legal authority in the interpretation of the ICC articles mentioned above, we pass them on merely as illustrative of what our contacts here in Khartoum anticipate as likely actions by the GOS if there is an arrest warrant. The chances of the GOS convincing the ICC that its legal system is a suitable substitute are slim indeed, but we can nonetheless expect that the GOS will try to make their case - as often happens in Sudan, too little too late to matter.

FERNANDEZ